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IN THE

Supreme Court of the United States

October Term 1967
No. 767

LOUIS SANDERS, *et al.*,

Petitioners,

vs.

JOHN ERRECA, *et al.*,

Respondents.

Respondents' Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Questions Presented.

1. Did the Circuit Court deny Petitioners due process when it affirmed the judgment of the District Court on the grounds that the complaint failed to allege facts sufficient to invoke the jurisdiction of the Federal Court where one of the major issues involved was whether petitioners had sufficiently alleged a deprivation of a constitutionally protected property right?

2. Where a resolution authorizing the condemnation of land is passed allegedly to cloud petitioners' title subsequent to threats of litigation, and a condemnation action is initiated some ten months later, has such threatened litigation and delay causing petitioners to interrupt the redevelopment of their property created a federal claim under the Constitution sufficient to invoke the original jurisdiction of the District Court?

Supplemental Statement.

The amended complaint depicts the petitioners as landowners who were in the process of transforming their property into a new shopping center when in March 1965 respondent Pedley, a state agent, informed the petitioners that their land was needed for a freeway and requested them to cease work on the new shopping center. If petitioners did not cease development they were informed that litigation would be commenced by the California Department of Public Works to prevent further development [R. Vol. 1, pp. 30-31].

Subsequently, in May 1965 respondent highway commissioners passed a resolution authorizing the condemnation of all of petitioners' land and improvements for freeway purposes, which resolution allegedly cast a cloud on the title of petitioners' property. The statements by Pedley are claimed to be fraudulent because at the time they were made no resolution was in effect authorizing condemnation proceedings [R. Vol. 1, p. 31]. No action was taken to file condemnation proceedings until March 7, 1966 [R. Vol. 1, p. 145] approximately ten months after passage of the above mentioned resolution. The condemnation proceedings are predicated on an amended resolution which authorized the taking of a substantial portion of petitioners' property instead of their total holdings [R. Vol. 1, p. 156].

The petitioners claim that the above actions by state officers effected a "taking" of property without compensation [R. Vol. 1, pp. 32-33].

The District Court dismissed the action because the acts alleged did not constitute "a taking or damaging of property within the protection afforded by the United

States Constitution" and further that the highway commissioners were immune from civil liability [R. Vol. 1, p. 98].

A motion for new trial or for other relief based on newly discovered evidence was denied [R. Vol. 1, pp. 198-199].

An appeal to the United States Court of Appeals for the Ninth Circuit followed. Petitioners' opening brief dealt largely with the immunity issue and to a lesser degree with the issue of whether the acts alleged showed a constitutional deprivation of property rights (App. Op. Br. pp. 34-39). Respondents' brief, on the other hand, was aimed at whether a federal claim had been stated sufficient to invoke the District Court's jurisdiction (Appellees' Br. pp. 6-17, specifically at pp. 6. 9 and 13) and immunity. Petitioners' reply brief again stressed the immunity issue with but minor attention to the existence of a constitutional right (App. Reply Br. pp. 10-13). Subsequent to lengthy argument the Circuit Court affirmed on the grounds that the "claim does not invoke the jurisdiction of the Federal Court" because it failed to "allege facts which show that appellants were subjected to the deprivation of a right, privilege or immunity secured by the Constitution and laws of the United States" (377 F. 2d 960, at p. 964).

Following the denial of appellants' petition for rehearing they filed this petition for a writ of certiorari in substance asking for review of the Circuit Court's decision on the grounds that they were denied due process by the Circuit Court, and that there is a conflict in Circuit decisions.

REASONS FOR DENYING CERTIORARI.

1. The Circuit Court Granted Petitioners Full Review on All Issues Raised in the Pleadings.

Petitioners express surprise at the Circuit Court's determination that the facts they allege failed to show a constitutional violation so as to invoke the jurisdiction of the Federal Court. They apparently quibble about the distinction between lack of jurisdiction of the subject matter and the lack of sufficient facts to state a federal claim. While the difference between lack of jurisdiction and failure to state a federal claim may be important in some cases (*Binderup v. Pathe Exchange* (1923), 263 U.S. 291, 44 S. Ct. 96, 68 L. Ed. 308) in the instant action it is a distinction without a difference.

Respondents' motion to dismiss in the trial court went directly to the absence of facts on which to predicate a federal claim. Such an attack necessarily draws into question the District Court's jurisdiction.

> "The court below had jurisdiction to determine its own jurisdiction on the ground of a federal question. . . . We are not holding that the complaint fails to state a cause of action upon which relief may be granted in a state court, but that appellee's claim or right does not arise out of the Constitution or laws of the United States. Whether the complaint states a cause of action arising under the Constitution and laws of the United States is for the court, not the pleader, to determine. . . . Where neither the constitutional provision nor any act of Congress affords a remedy to any person the mere assertion by a plain-

tiff that he is entitled to such a remedy cannot be said to satisfy federal jurisdictional requirements."

Screven Co. v. Brier Creek Hunting and Fishing Club (1953), 202 F. 2d 369, certiorari denied 345 U.S. 994, 73 S. Ct. 1136, 97 L. Ed. 1402.

In *Beistline v. San Diego* (1958), 256 F. 2d 421, fraud was charged against city officials in the acquisition of plaintiff's land for a "private" purpose. The Ninth Circuit explained the jurisdictional defect in the following manner at page 425:

"Every case of fraud and duress does not involve a constitutional question of due process . . . the facts here, interpreted most favorably toward appellant, show no deprivation of due process by the City of San Diego in the acquisition of the property. . . .

"If the plaintiff can plead and prove a good case of fraud and duress, his remedy lies as it does with any other litigant, in the state court.

"We affirm the judgment below for lack of jurisdiction."

Thus, while the petitioners may have set forth a cause of action for common law fraud below they must still satisfy the jurisdictional requirement of a federal claim. This was the issue before the Circuit Court.

The above cases deal with §1331 of Title 28 United States Code. Section 1343 is similarly interpreted, and limits jurisdiction to cases where a federal claim is based on a factual showing of the denial of a personal constitutional right.

Hague v. Committee For Industrial Organization (1939), 307 U.S. 496, 531, 59 S. Ct. 954, 83 L. Ed. 1423;

Ream v. Handley (1966), 359 F. 2d 728.

How petitioners were misled in missing the jurisdictional issue defies explanation. Indeed their arguments attempted to convince the courts below that the facts alleged showed a constitutional deprivation of property rights, a *sine qua non* to their right of recovery. Respondents moved to dismiss the amended complaint on three grounds: (1) that no taking or damage of property rights was shown, (2) immunity of the highway commissioners, and (3) that fraud and bad faith were not adequately pleaded. The jurisdictional point should have been brought home to petitioners when the motion to dismiss was granted as to grounds 1 and 2 and denied as to ground 3.

Petitioners' inference that the Circuit Court trapped them by deciding the case for lack of jurisdiction demonstrates a disregard of the record and a failure to reach issue with respondents in that court. It has been clear from the inception of this case that the attack on the complaint was the lack of the trial court's power to go on to the merits because no federal claim was stated.

Petitioners' choice to underemphasize the issue was theirs and not the error of the court below. The distinction drawn between jurisdiction of the subject matter and federal claim jurisdiction is an exercise in sophistry.

Petitioners received full appellate review on the question of whether they stated a federal claim.

2. The Circuit Court's Decision Is Consistent With Other Circuit Opinions Dealing With Similar Situations.

The rule urged by petitioners on this Court is strict federal liability for all misconduct by every state official in the exercise of his office. The court below correctly refused to recognize such a rule.

The essence of the Circuit Court's opinion is that the threats of litigation by state officials, including passage of a condemnation resolution and subsequent delay in appropriating the owners' property by eminent domain did not constitute a federal claim.

Similar facts were presented to the Seventh Circuit in *Ream v. Handley, supra,* 359 F. 2d 728. There the landowners complained that they were unable to sell lots in their residential subdivision after 1956 because defendants published the location of a highway affecting their property and refused to acquire their property by purchase or condemnation along with other properties in the vicinity. Incidental damages were also claimed for threats to enter and trespass on the owner's land. Reaching the same result as the Ninth Circuit, the court held at page 731:

> "These statutory sections (28 U.S.C.A. §§ 1331, 1343) are jurisdictional. But it is necessary for plaintiffs to find another law which authorizes the commencement of an action. In their search they point to the fourteenth amendment and 42 U.S.C.A. § 1983. Regarding the former, we already have held that no 'genuine and present controversy' exists under that amendment. . . . The controlling authority, however, seems to hold that

the civil rights statutes, of which § 1983 is one, do not confer jurisdiction where a person seeks only to protect property or monetary rights. . . .

"In any event, plaintiffs have no action under § 1983 because said section creates a cause of action for only the violation of federal rights. . . .

"Thus an action for slander of title or trespass is not a right created by the constitution or any federal statute relied on by plaintiffs."

Petitioners, like the *Reams,* relied heavily on *Progress Development Co. v. Mitchell* (1961), 286 F. 2d 222. It is distinguishable as follows:

"However, in that case the individual defendants allegedly conspired to deprive plaintiffs of equal protection of the laws by inducing the park board to condemn plaintiffs' land and inducing village trustees to abuse enforcement of the building code for the purpose of denying plaintiffs' right to conduct corporate enterprises. Here, the fourteenth amendment is involved remotely, if at all. It is defendants nonaction (refusal to purchase or condemn any of plaintiffs' land), coupled with statements of public officials and newspaper publicity, that is the crux of plaintiff's complaint. But plaintiffs do not allege that the highway in question will not in fact be built in the location mentioned, nor that any of the defendants has taken, or threatens to take, their land for such a use without just compensation therefor."

Thus the same circuit which decided the *Mitchell* case denies jurisdiction on facts closely akin to those in the instant action. Based on this similarity of allegations there is no conflict between the seventh and ninth circuits. In accord with the views expressed in

Ream is the decision in *Beistline v. San Diego, supra,* 256 F. 2d 421, where the plaintiffs claimed they were forced to sell land to the city under threat of condemnation proceedings amounting to fraud and duress by city officers who allegedly acquired the property for private purposes. Such facts were held insufficient to bestow jurisdiction on the federal court.

Threats and force by county officers to remove an obstruction from a roadway which the owner claimed was private property did not involve a substantial federal question in *Screven Co. v. Brier Creek Hunting and Fishing Club, supra,* 202 F. 2d 369, although the court recognized that an incidental constitutional question might "lurk in the background of the record."

People of Colorado v. District Court (1953), 207 F. 2d 50 does not support petitioners' position since the injunction granted by the trial court was vacated on appeal. The dictum applies to a factual situation where established access rights were being destroyed without the availability of a procedural remedy to obtain compensation.

Finally, the *Foster* opinions (*Foster v. Hurley* (1964), 330 F. 2d 87 and *Foster v. Detroit* (1966), 254 F. Supp. 655) are similar to the *Mitchell* case and the decisions are consistent with it but are entirely distinct from the instant action. The crucial difference in *Foster* is demonstrated by the fact that the owners were denied any compensation for existing improvements which were destroyed while a condemnation action had been pending for ten years and then dismissed. As in the *Mitchell* case the *Fosters* were denied permission to improve their existing structure by city ordinance so that the structure was required to be de-

molished. In a second condemnation action the *Fosters* received no compensation for the structure which they had been compelled to demolish. "Thus, plaintiffs did not received just compensation for the taking of their property." (254 F. Supp. 666.)

Foster as well as *Mitchell* are therefore distinguishable from *Ream*[1] and the instant case on the basis of the facts alleged. No conflict therefore exists among the circuits. Petitioners' claim of delay in instituting the action is a far cry from the city's actions in *Foster* where suit was actually commenced and a *lis pendens* recorded, legally clouding the title to the property.

Generally, delay in commencing proceedings after their authorization does not constitute the deprivation of a constitutional right. *Shoemaker v. U.S.* (1892), 147 U.S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

The crux of petitioners' complaint is an attempt to recover damages for a cloud on their title caused by the prospect of litigation authorized by the condemnation resolution. The federal courts are not for such purposes. *Devine v. Los Angeles* (1906), 202 U.S. 313, 26 S. Ct. 652, 50 L. Ed. 1046.

As in *Devine* above the court below correctly analyzed petitioners' grievance and adopted the reasoning of this Court in reaching its conclusion:

> "The averment of unconstitutionality is a mere pretext to obtain that jurisdiction." (202 U.S. 335, 50 L. Ed. 1054.)

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[1]Other authorities in accord are *Holt v. Indiana Mfg. Co.* (1900), 176 U.S. 68, 72, 20 S. Ct. 272, 44 L. Ed. 374; *Hague v. Committee for Industrial Organization* (1939), 307 U.S. 496, 531, 59 S. Ct. 954, 83 L. Ed. 1423; *Abernathy v. Carpenter* (1962), 208 F. Supp. 793, 794; *Ortega v. Ragen* (1954), 216 F. 2d 561, 562.

Conclusion.

The decisional conflict perceived by petitioners does not exist unless every common law action dealing with the title and use of land needed for public use is said to be within the jurisdiction of the federal courts. False pretenses notwithstanding, petitioners seek recovery for the effect of a condemnation resolution and prospective litigation on the title and use of property. At best this is an action to recover damages for slander of title based on fraud or duress. The constitutional guarantee is not so broad. It is limited to the taking or damaging of a property right without fair compensation.

Petitioners do not claim that their property is not being taken for a public purpose and they do not show that just compensation will be denied when the land is eventually acquired.[2] California courts are equal to such task. In the absence of such a showing on the face of the complaint, no federal claim is stated. No jurisdiction exists.

For the above reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

HARRY S. FENTON,
R. B. PEGRAM,
By R. B. PEGRAM,
Counsel for Respondents.

Of Counsel:
JOSEPH A. MONTOYA,
RICHARD L. FRANCK,
ANTHONY J. RUFFOLO,
RONALD L. JOHNSON.

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[2]Eminent domain proceedings in the state court entitled *People v. Groode*, Los Angeles County Superior Court No. 880137, are presently pending and scheduled for trial on February 26, 1968.